617A

(16)

No. 05-381

Supreme Court, U.S.
FILED
AUG 24 2006
OFFICE OF THE CLERK

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

STEPHEN V. BOMSE
M. LAURENCE POPOFSKY
Heller Ehrman LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

KEVIN J. ARQUIT
JOSEPH F. TRINGALI
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
NICKOLAI G. LEVIN
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

KENNETH F. KHOURY
GUY C. STEPHENSON
Weyerhaeuser Company
33663 Weyerhaeuser Way S.
Federal Way, WA 98003
(253) 924-2345

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the Court held that an antitrust plaintiff alleging predatory selling must prove that the defendant (1) sold its product at a price level too low to cover its costs and (2) had a dangerous probability of recouping its losses once the scheme of predation succeeded.

The question in this case is whether a plaintiff alleging predatory *buying* may, as the Ninth Circuit held, establish liability by persuading a jury that the defendant purchased more inputs "than it needed" or paid a higher price for those inputs "than necessary," so as "to prevent the Plaintiffs from obtaining the [inputs] they needed at a fair price"; or whether the plaintiff instead must satisfy what the Ninth Circuit termed the "higher" *Brooke Group* standard by showing that the defendant (1) paid so much for raw materials that the price at which it sold its products did not cover its costs and (2) had a dangerous probability of recouping its losses.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states that Weyerhaeuser Company ("Weyerhaeuser") is a publicly owned company that does not have a parent corporation. No publicly owned company owns 10% or more of its stock. However, based on its Schedule 13G as filed with the Securities and Exchange Commission on February 6, 2006, Capital Research and Management Company is deemed to be the beneficial owner of 15.2% of Weyerhaeuser's common stock as a result of acting as an investment adviser to various investment companies registered under the Investment Company Act of 1940.

CONTENTS

Page

QUESTION PRESENTED I
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISION INVOLVED 1
STATEMENT 1
INTRODUCTION AND SUMMARY OF ARGUMENT 10
ARGUMENT 12
PETITIONER DID NOT ENGAGE IN PREDATORY BUYING VIOLATIVE OF SECTION 2 12
A. *Brooke Group*'s Requirement That A Plaintiff Prove Below-Cost Pricing And A Dangerous Probability Of Recoupment Should Apply To Predatory Buying Claims 14
1. This Court's Predatory Pricing Decisions, Culminating In *Brooke Group*, Establish That Objective Rules Are Essential To Distinguish Predatory From Competitive Pricing 14
2. The *Brooke Group* Test Should Govern Predatory Buying Claims Because The Rationale Of The Court's Predatory Selling Decisions Applies Just As Strongly In The Predatory Buying Context 18
a. A predatory buying plaintiff must prove that the defendant's costs exceeded its revenues 18

CONTENTS – Continued

Page

(i) False positives on the buy side punish desirable competition 18

(ii) An objective cost-revenue standard is needed to govern predatory buying claims 21

b. Proof of recoupment also is essential to a predatory buying claim 25

3. Courts Have Recognized In A Variety Of Contexts That Allegations Of Buy-Side Predation Should Be Reviewed Under Standards Equivalent To Those That Apply To Parallel Claims Of Sell-Side Predation 26

4. The Antitrust Laws Protect Aggressive Competition By Buyers Because Buyer Competition Promotes Consumer Welfare 28

5. The Ninth Circuit's Elasticity Exception Makes No Legal, Economic, Or Factual Sense 32

6. There Is No Separate "Overbuying" Claim In This Case 34

B. The Ninth Circuit's "Fair Price" Test Penalizes Legitimate Competition And Provides No Guidance For Juries Faced With Predatory Buying Claims 37

C. Respondent Is Not Entitled To A Retrial On Its Predatory Pricing Claim And Its Remaining Claims Cannot Support The Verdict 44

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Cases:

A.A. Poultry Farms, Inc. v. *Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989) 17, 24

American Tobacco Co. v. *United States*, 328 U.S. 781 (1946) 27

Apex Hosiery Co. v. *Leader*, 310 U.S. 469 (1940) 29

Associated Press v. *United States*, 326 U.S. 1 (1945) 27

Ball Mem. Hosp., Inc. v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986) 30, 40

Barry Wright Corp. v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) ..... *passim*

Betaseed, Inc. v. *U & I Inc.*, 681 F.2d 1203 (9th Cir. 1982) 26

Boyle v. *United Techs. Corp.*, 487 U.S. 500 (1988) 46

Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) ..... *passim*

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 41

Cargill, Inc. v. *Monfort of Colo., Inc.*, 479 U.S. 104 (1986) ..... *passim*

City of Columbia v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991) 45

Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984) 41

Eastman Kodak Co. v. *Image Technical Servs., Inc.*, 504 U.S. 451 (1992) 25

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 46

TABLE OF AUTHORITIES – Continued

Page(s)

FTC v. *Consolidated Foods Corp.*, 380 U.S. 592 (1965) 27

FTC v. *Motion Picture Adver. Serv. Co.*, 344 U.S. 392 (1953) 27

Greenbelt Coop. Pub'g Ass'n v. *Bresler*, 398 U.S. 6 (1970) 46

Houser v. *Fox Theatres Mgmt. Corp.*, 845 F.2d 1225 (3d Cir. 1988) 26

Kartell v. *Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984) 10, 19, 38, 39

Khan v. *State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996), rev'd on other grounds, 522 U.S. 3 (1997) 26

Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) 27

Mandeville Island Farms v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) 27, 29

Maryland v. *Baldwin*, 112 U.S. 490 (1884) 45

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) ..... *passim*

Memphis Cmty. Sch. Dist. v. *Stachura*, 477 U.S. 299 (1986) 46

Monsanto Co. v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) 20, 26

National Soc'y of Prof'l Eng'rs v. *United States*, 435 U.S. 679 (1978) 19

Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) 46

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1967) 46

TABLE OF AUTHORITIES – Continued

Page(s)

Northern Pac. Ry. Co. v. *United States*,
356 U.S. 1 (1958) 32

Schor v. *Abbott Labs.*,
2006 WL 2062117 (7th Cir. July 26, 2006) 23

Spectrum Sports, Inc. v. *McQuillan*,
506 U.S. 447 (1993) 12, 13

Stearns Airport Equip. Co. v. *FMC Corp.*,
170 F.3d 518 (5th Cir. 1999) 25

Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) 45, 46

Telecor Communications, Inc. v. *Southwestern Bell Tel. Co.*, 305 F.3d 1124 (10th Cir. 2002), cert. denied, 538 U.S. 1031 (2003) 31

Texaco Inc. v. *Hasbrouck*, 496 U.S. 543 (1990) 49

Todd v. *Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001) 26

Town of Concord v. *Boston Edison Co.*,
915 F.2d 17 (1st Cir. 1990) 39, 40, 41

United States v. *AMR Corp.*,
335 F.3d 1109 (10th Cir. 2003) 47

United States v. *Addyston Pipe & Steel Co.*,
85 F. 271 (6th Cir. 1898), aff'd,
175 U.S. 211 (1899) 38

United States v. *Crescent Amusement Co.*,
323 U.S. 173 (1944) 27

United States v. *Griffith*, 334 U.S. 100 (1948) 27

United States v. *Socony-Vacuum Oil Co.*,
310 U.S. 150 (1940) 19, 27

TABLE OF AUTHORITIES – Continued

Page(s)

United States v. *Syufy Enters.*,
903 F.2d 659 (9th Cir. 1990) 26

United States v. *Trans-Missouri Freight Ass'n*,
166 US. 290 (1897) 38

United States v. Trenton Potteries Cos.,
273 U.S. 392 (1927) 38

United States v. *United States Gypsum Co.*,
438 U.S. 422 (1978) 42

Verizon Communications Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) ..... *passim*

Statutes:

15 U.S.C. § 1 45

15 U.S.C. § 2 ..... *passim*

28 U.S.C. § 1254(1) 1

Miscellaneous:

P. Areeda & H. Hovenkamp, ANTITRUST LAW,
(2d ed. 2002) ..... *passim*

R. Blair & J. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991) 31

R. Blair & J. Harrison, MONOPSONY (1993) 22, 25, 27

D. Carlton & J. Perloff, MODERN INDUSTRIAL ORGANIZATION (4th ed. 2005) 28

F. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972 (1986) 13, 40

F. Easterbrook, *The Limits of Antitrust*,
63 TEX. L. REV. 1 (1984) 22

TABLE OF AUTHORITIES – Continued

Page(s)

A. Gavil, W. Kovacic & J. Baker, ANTITRUST LAW IN PERSPECTIVE (2002) 28

H. Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147 (2005) 13

J. Jacobson & G. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1 (1991) 28

W. Jones, *Concerted Refusals To Deal and the Producer Interest in Antitrust*, 50 OHIO ST. L.J. 73 (1989) 29

J. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625 (2005) 20

R. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589 (2005) 27, 42

R.H. Pate, *The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct* (Oct. 23, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/202724.pdf 17

R. Posner, ANTITRUST LAW (2d ed. 2001) 24

S. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 ANTITRUST L.J. 669 (2005) 20

R.E. Taylor & Associates, *Wood . . . Where Its Going . . . Where Its Coming From?*, Presentation to the NAWLA Magellan Club (Nov. 9, 2002), *available at* http://tinyurl.com/embv5 43

TABLE OF AUTHORITIES – Continued

Page(s)

Testimony of R.H. Pate, Assistant Attorney General Antitrust Division, Before the Committee on the Judiciary United States Senate Concerning Antitrust Enforcement in the Agricultural Marketplace (October 30, 2003), *available at* http://www.usdoj.gov/atr/public/testimony/201430.pdf 27, 30

U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (1997).....27

R. Zerbe, *Monopsony and the* Ross-Simmons *Case: A Comment on Salop and Kirkwood*, 72 ANTITRUST L.J. 717 (2005) 20

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 411 F.3d 1030. The order of the court of appeals denying petitioner's rehearing petition (Pet. App. 48a) is unreported. The order of the district court denying petitioner's motion for judgment as a matter of law (Pet. App. 28a-46a) is unreported. The order of the district court entering final judgment (Pet. App. 47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2005, and a timely petition for rehearing was denied on July 8, 2005. The petition for a writ of certiorari was filed on September 23, 2005, and was granted on June 26, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Sherman Act (15 U.S.C. § 2) provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize * * * any part of the trade or commerce among the several States * * * shall be deemed guilty of a felony * * *."

STATEMENT

This case involves a claim of predatory *buying*, in which the plaintiff alleges that its competitor violated Section 2 of the Sherman Act by paying too much for raw materials with the goal of forcing the plaintiff out of business by raising its costs. The Ninth Circuit upheld a damages award of nearly $80 million, approving a jury instruction stating that liability may be imposed in a predatory buying case whenever a jury concludes that the defendant purchased more raw materials "than it needed" or paid a higher price for them "than necessary," so as to prevent competitors from obtaining those ma-

terials "at a fair price." The court of appeals refused to apply the standard that this Court has set out to govern predatory *selling* cases, where the plaintiff can prevail only if it proves (1) "that the prices complained of are below an appropriate measure of its rival's costs" and (2) that the defendant had "a dangerous probability[] of recouping its investment in below-cost prices." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993). It did so even though this Court's decisions in other antitrust contexts, and settled economic theory, strongly support applying the same predatory pricing standard to "buy-side" and "sell-side" claims.

Brooke Group rests upon this Court's recognition that price competition plays a central role in the robust competition mandated by the Sherman Act, and that legal standards that chill ordinary price competition are therefore anathema to the antitrust laws. Businesses cannot know how to comply with a subjective standard that hinges liability on whether a jury believes that prices paid for inputs are "necessary," let alone whether a price paid is "unfair" to a competitor – a standard that perversely rewards inefficiency. Such an approach will generate pervasive confusion about what bidding and buying practices are permissible, will encourage baseless litigation, and will *diminish* buy-side competition. The Court should make clear that *Brooke Group*'s standards apply to claims of predatory buying as well as those involving predatory selling. As the Solicitor General observed in supporting the grant of certiorari in this case, the Ninth Circuit's contrary holding "threatens to chill procompetitive conduct by companies that bid aggressively in order to ensure access to inputs or to increase their output," and "is inconsistent with this Court's Section 2 decisions more generally, which have emphasized the need for objective standards in order to foster robust competition." U.S. Cert. Am. Br. 7.

1. This case involves a market for red alder sawlogs in the Pacific Northwest. The principal participants in this mar-

ket are timberland owners who supply the logs; and production facilities, including lumber sawmills, that buy and process the logs into finished hardwood lumber and other products that are sold to wholesalers, retailers, and end users. Pet. App. 2a-3a.

Red alder is the predominant species of hardwood sawlog harvested in the Pacific Northwest. J.A. 152a. (Hardwoods are deciduous trees whose leaves fall during the autumn and winter; softwoods are conifers whose "needles" do not fall on a seasonal basis. J.A. 151a.) Hardwood logs typically are taken to production facilities that specialize in processing hardwood logs. The parties stipulated that "[r]ed alder trees are typically, but not always, harvested within 100 miles of the sawmill in which [they are] processed into hardwood lumber, chips, and other products." J.A. 153a. Hardwood lumber is used in a variety of end-products, including furniture, pallets, cabinetry, molding, and specialty wood products such as picture frames and musical instruments. J.A. 152a.

There are many owners of standing timber in the Pacific Northwest, including the state and federal governments, at least seventeen private companies, and numerous individuals. These timberland owners sell their logs through oral bids, sealed written bids, and supply agreements. In order to maximize revenues, they frequently "shop th[eir] wood around the circuit [of potential buyers]" more than once to increase the bidding. J.A. 414a-415a; see also J.A. 190a, 215a-216a, 252a, 361a-365a, 407a-408a, 615a-616a.

Alder is sometimes referred to as a "come-along" species because a tract consisting primarily of softwood trees also may contain a relatively small quantity of alder. J.A. 145a, 293a, 636a-637a. When such tracts are harvested in order to obtain the softwood, the alder is harvested at the same time. *Ibid.* Not all alder is come-along, however: there are some tracts of timber that are predominantly or nearly all alder. Indeed, evidence at trial demonstrated that about 30% of the

alder harvested is not come along at all (see J.A. 750a) and thus is harvested solely by reference to prices in the alder log market. Even "come-along" alder is price sensitive to the extent that timber owners may choose to harvest tracts with higher or lower percentages of alder depending upon then-current alder log prices. See note 24, *infra*; see also J.A. 921a (chart showing variance in annual quantity of alder logs harvested, with variance correlated with prices paid for logs).

2. Plaintiff Ross-Simmons Hardwood Lumber Co., respondent here, operated a hardwood sawmill in Longview, Washington, that went out of business in 2001. Petitioner Weyerhaeuser is an integrated forest products company that also operates hardwood sawmills in the Pacific Northwest.

Ross-Simmons alleged that Weyerhaeuser violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by monopolizing or attempting to monopolize the alder sawlog market in the Pacific Northwest. In particular, plaintiff's theory was that Weyerhaeuser overpaid for alder sawlogs, and occasionally stockpiled those it purchased, with the aim of driving competing sawmills out of business; once free of competition, the claim continued, Weyerhaeuser planned to recoup its overpayments by reducing future prices paid to log suppliers. With respect to the conduct element of its Section 2 claim, Ross-Simmons argued that sawlog prices increased during the alleged predation period, the price of finished lumber decreased during that time, and Weyerhaeuser suffered declining profits due to the high prices it paid for raw materials. Pet. App. 17a-18a.[1]

---

[1] Ross-Simmons alleged several other anticompetitive acts, but the court of appeals based its decision upholding the judgment for plaintiff entirely on Ross-Simmons' predatory buying claims. Pet. App. 18a & n.42.

Although Ross-Simmons blamed rising log prices for its failure, there was evidence that it suffered from substandard equip-

Ross-Simmons did *not* allege, however, that Weyerhaeuser paid so much for alder sawlogs in the Pacific Northwest that its revenues from sales of finished alder lumber and other products made from alder sawlogs fell short of its costs of production. Neither did Ross-Simmons allege that, even if Weyerhaeuser succeeded in destroying certain competitors, it had a dangerous probability of reaping monopoly profits for long enough to recoup the losses incurred during the alleged predation period.

The jury found that the market for buying alder sawlogs constituted a relevant product market and that the Pacific Northwest is the relevant geographic market for such purchases. Pet. App. 2a. Ross-Simmons alleged that the predatory conduct occurred between 1996 and 2001. Resp. Ct. App. Br. 17 & 20 (stating that Weyerhaeuser did not acquire monopoly power until 1995). The evidence showed that during that period, Weyerhaeuser acquired approximately 65% of the alder sawlogs available for processing in the Pacific Northwest and sold all of the alder lumber it produced. J.A. 341a, 501a.

Ross-Simmons also alleged that Weyerhaeuser monopolized the downstream market for finished alder lumber in the United States – plaintiff did not contend that there was a smaller geographic market – but the jury found that there is no relevant product market for finished alder lumber. J.A. 967a. Alder lumber competes with other types of hardwood lumber sold throughout North America. J.A. 692a-700a. Weyerhaeuser lacks market power as a seller in the highly competitive market for hardwood lumber; it produces less than 3% of the product sold in the North American hardwood lumber market. J.A. 700a.

---

ment, inefficient operations, increased natural gas prices, poor management, and inadequate capital reinvestment. See J.A. 212a, 427a-428a, 431a, 439a-441a, 443a-444a, 485a-487a; see also ER 634-635.

3. Weyerhaeuser sought summary judgment prior to trial, arguing that Ross-Simmons' predatory buying claim was governed by the two-part standard adopted by this Court in *Brooke Group* and that plaintiff failed to show either that Weyerhaeuser sold its products at a loss or that it could have recouped any loses after the period of alleged predation. J.A. 10a, 20a-24a, 31a-33a. The district court denied the motion, holding that proof that Weyerhaeuser operated at a loss was not required: "I see no practical difference between predatory pricing that results in a company purposely selling a product at a loss of one cent per unit, versus selling the same product at a profit of only one cent per unit when the company would have earned a larger profit but for its anticompetitive conduct." J.A. 67a.

At trial, Ross-Simmons did not introduce evidence that Weyerhaeuser's costs of producing alder sawlog products in the Pacific Northwest exceeded its revenues from sales of those products. Indeed, it is undisputed that Weyerhaeuser and its alder sawmills in the Pacific Northwest operated at a profit throughout the alleged predation period. J.A. 704a, 764a-769a, 921a.

Similarly, Ross-Simmons did not introduce evidence showing that Weyerhaeuser would be able to recoup any losses that it incurred as a result of the alleged predation by forcing a reduction in sawlog prices once it stopped engaging in predation. Indeed, the record showed that even during the alleged predation period, although nine hardwood sawmills in the Pacific Northwest closed, four others opened, and still other sawmills expanded their operations. J.A. 161a, 740a, 741a.

Plaintiff instead based its claim on evidence that Weyerhaeuser acted with anticompetitive intent in setting its purchase prices for alder logs. Pet. App. 19a-20a. That evidence consisted largely of statements made by Weyer-

haeuser employees relating to their intent to affect prices and overcome competitors. *Ibid.*

Weyerhaeuser introduced undisputed evidence concerning the quality and efficiency of its hardwood sawmills. Thus, the parties stipulated that Weyerhaeuser invested almost $80 million in improvements to its hardwood sawmills between 1986 and 2000. J.A. 158a, 159a. These improvements increased production capacity significantly. See, *e.g.*, J.A. 160a (lumber production at Longview mill increased from 149.8 million board feet (mbf) to 326.6 mbf).

In addition to expanding mill capacity, Weyerhaeuser undertook a significant effort to increase the amount of lumber that could be extracted from a given volume of logs, seeking to "extract[] higher value [from] the existing log flow and raw materials" during the early 1990s. J.A. 549a-550a; see also J.A. 549a ("[Weyerhaeuser] tried from the smaller logs in particular to extract grade lumber."). Numerous improvements were made at the mill level, such as installing equipment that allowed Weyerhaeuser mills to saw along "the curve of the log" in order to increase yield. J.A. 549a.

Ross-Simmons did not have equivalent productive capabilities. For instance, Wayne Kidd, who was hired in 2000 to help Ross-Simmons turn around its operations, testified on cross-examination that Ross-Simmons' mill was a "tired operation" when he first saw it in 2000-2001 (J.A. 438a), and that, in his opinion, the equipment he saw was "dated 10 to 15 years before 2000" (J.A. 443a). In particular, he stated that the mill's canter (a type of saw) was "atrocious" (J.A. 440a), the mill could not handle a small log "efficiently" (J.A. 440a), and its saws "were no good" (J.A. 441a), among other deficiencies.

At the close of the evidence, Weyerhaeuser moved for judgment as a matter of law on the ground that the *Brooke Group* test governed plaintiff's claim of buy-side predation,

and that Ross-Simmons had not introduced evidence establishing the two elements of that standard. J.A. 719a, 938a, 940a-942a. The district court denied the motion. J.A. 720a.

4. The district court initially proposed a jury instruction regarding the predatory buying claim that did not require comparison of Weyerhaeuser's costs and revenues but did require proof that "Defendant had a reasonable expectation that it could subsequently recoup any losses it had sustained through this conduct, either by paying lower log prices in the future or by charging higher prices for Defendant's products due to a reduction in competition from other saw mills." J.A. 960a.[2]

Weyerhaeuser objected to the instruction on the ground that it did not require proof that Weyerhaeuser had sustained a loss (J.A. 725a); Ross-Simmons, by contrast, objected to the recoupment requirement because "[predatory] bidding is exclusionary conduct regardless of whether or not you can show recoupment." J.A. 728a. The district court overruled Weyerhaeuser's objection but deleted the reference to recoupment as requested by Ross-Simmons. J.A. 729a. Weyerhaeuser again objected to the instruction as modified. J.A. 730a. The court nevertheless instructed the jury as follows with respect to Weyerhaeuser's log buying practices:

> One of Plaintiffs' contentions in this case is that the Defendant purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price. If you find this to be true, you may regard it as an anticompetitive act.

---

[2] Although the parties had submitted various proposed instructions, the district court presented the parties with its own draft instructions and directed them to raise any objections to that proposed draft. J.A. 721a-722a.

Pet. App. 7a n.8; J.A. 978a. The jury returned a verdict for plaintiff, awarding $26,256,406 in damages. J.A. 967a-968a.

Weyerhaeuser renewed its motion for judgment as a matter of law, again raising the *Brooke Group* issue, and the motion was denied by the district court. Pet. App. 28a-46a. The jury's damages award was trebled to $78,769,218. *Id.* at 4a.

5. The court of appeals affirmed. Pet. App. 1a-27a. Weyerhaeuser argued that the jury instruction was wrong and the verdict insupportable because the plaintiff had not been required to satisfy (and could not have satisfied) the requirements of *Brooke Group* by showing both (1) that Weyerhaeuser paid so much for alder logs in the Pacific Northwest that its revenues from sales of products produced from the logs did not cover its costs, and (2) that Weyerhaeuser had a dangerous probability of recouping the losses allegedly incurred during the period of predation. The Ninth Circuit acknowledged that, "to establish liability under *Brooke Group*, a plaintiff ha[s] to show that its competitor operated at a loss and was likely to recoup its losses." *Id.* at 7a. But the court held that standard inapplicable in this case because "*Brooke Group* does not control in the buy-side predatory bidding context." *Id.* at 5a.

In reaching this conclusion, the Ninth Circuit reasoned that *Brooke Group* "established a high liability standard for sell-side predatory pricing cases because of its concern with the facts that consumers benefit from lower prices and that cutting prices often fosters competition." Pet. App. 8a. But, the court continued, "an important factor distinguishes predatory bidding cases from predatory pricing cases: benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." *Id.* at 8a-9a; see also *id.* at 10a. Because the court of appeals accordingly held that "*Brooke Group* does not govern in this case," it ruled that the district court "did not need to instruct the jury that overbidding for sawlogs could

be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of Weyerhaeuser's recoupment of its losses existed." *Id.* at 13a.

The court added that the instructions given – which told the jury to determine whether Weyerhaeuser purchased more logs than "needed," paid a higher price than "necessary," and prevented plaintiff from obtaining logs at a "fair" price" – "provided sufficient guidance regarding how to determine whether conduct was anticompetitive." Pet. App.14a. The court went on to affirm the verdict under this instruction because it found evidence that Weyerhaeuser engaged in predatory conduct, had an intent to monopolize, and had a dangerous probability of achieving monopoly power in the relevant market. *Id.* at 12a-25a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The plaintiff in this case claims that an efficient competitor's unilateral pricing decisions violated Section 2 of the Sherman Act. That is the sort of improbable assertion that the Court has viewed with the greatest skepticism. The Court's principal insight in this area is that the market generally "knows" much better than judges when a price is too high or too low; as then-Judge Breyer explained, courts and juries are in any event profoundly ill-equipped to determine what is a "reasonable" or "fair" price. See *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 929 (1st Cir. 1984). Judicial intervention when unilateral pricing is challenged is therefore far more likely to discourage robust competition and harm consumers than it is to do any good.

That is especially so in the area of predatory pricing. Addressing claims of predatory pricing by sellers, the Court has recognized that such predation is rarely attempted and even more rarely successful, and that price cuts labeled predatory by rivals often in reality reflect the very essence of desirable competition. To avoid the "false positives" that would impede healthy and aggressive competition, the Court

accordingly articulated the objective, two-part test of *Brooke Group*: a plaintiff seeking to establish injury resulting from a rival's low prices must show (1) below-cost pricing and (2) that the alleged predator had a dangerous probability of recouping the losses incurred during the period of predation. An antitrust plaintiff that fails to make such a showing cannot prevail.

That test should apply with full force to claims of predatory buying, which in all relevant respects are identical to the predatory selling claims addressed in *Brooke Group*. Because the buyer's competitive instinct is to bid up price, the challenged conduct is indistinguishable from core competitive behavior – meaning that in the buying as in the selling context false positives will suppress beneficial and desirable competition. In addition, predatory buying, like predatory selling, is irrational absent the likelihood of recoupment.

Moreover, consumers benefit from competition by buyers, just as they do from competition by sellers: higher prices for the producers of inputs encourages greater production and innovation by those producers, which inevitably leads to lower prices for the ultimate consumer. Getting more inputs into the hands of efficient and innovative producers such as Weyerhaeuser likewise can be expected to lower prices in the downstream consumer market. And sellers, like the timber owners who were the direct beneficiaries of the buy-side competition condemned by plaintiff here, are themselves protected by the Sherman Act. The plaintiff in this case accordingly should have been required to satisfy the *Brooke Group* standard. Its failure to do so requires that the verdict be set aside.

The Ninth Circuit went astray not just in repudiating *Brooke Group*, but in its choice of a substitute test that asked the jury to determine whether Weyerhaeuser purchased more sawlogs "than it needed," paid a higher price for those sawlogs "than necessary," and did so to prevent rivals from ob-

taining sawlogs at a "fair" price. That wholly subjective approach, which provides no real guidance at all, is sure to confuse and punish aggressive competitors. For that reason, the Court has decisively rejected subjective standards like the one applied below in favor of rules that are objective, predictable, and consistent with the goal of encouraging vigorous competition.

The jury's general verdict, which was fatally flawed by the erroneous predatory buying instruction, cannot stand. Having had one bite at the predatory buying apple and failing to offer any probative evidence in support of its predation claim, plaintiff is not entitled to a retrial on that claim. Plaintiff's remaining claims of anticompetitive conduct are manifestly insubstantial, although the Court may wish to remand the case rather than itself determine in the first instance whether these claims should be dismissed rather than retried.

ARGUMENT

PETITIONER DID NOT ENGAGE IN PREDATORY BUYING VIOLATIVE OF SECTION 2.

It is "settled law" that an offense under Section 2 of the Sherman Act "requires, in addition to the possession of monopoly power in the relevant market, 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (citation omitted). Thus, "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Ibid.* (emphasis in original).

The Court has recognized in applying Section 2 that "[i]t is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects." *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458-59 (1993).

"Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Trinko*, 540 U.S. at 414 (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). Accordingly, "this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it." *Spectrum Sports*, 506 U.S. at 458-59; see also H. Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 148 (2005) ("A workable definition of exclusionary conduct under [Section] 2 of the Sherman Act must satisfy two criteria. First, it must define anticompetitive exclusionary conduct with tolerable accuracy, in particular, without excessive false positives. Second, it must be administrable by a court, perhaps in a jury trial.").

The claim asserted by plaintiff here – targeting the prices paid by one of its competitors for a key input – presents a very substantial risk of false positives punishing legitimate competitive behavior. Like the predatory selling claim addressed by the Court in *Brooke Group*, predatory buying claims therefore must be assessed against clear objective standards in order to avoid deterring valuable procompetitive behavior.

The Ninth Circuit's contrary approach is starkly inconsistent with these principles. The court of appeals held that a business accused of predatory buying may be held liable for trebled antitrust damages if the jury believes that the defendant purchased more inputs than it "needed" or paid a higher price for those inputs than was "necessary," so as to prevent rivals from obtaining inputs "at a fair price." This is the sort of liability standard that Judge Easterbrook has equated with "[t]hrowing [a] marshmallow at a jury." F. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 978 (1986). Under the Ninth Circuit's wholly subjective rule, it is impossible for businesses to know what pricing decisions conform with the law; firms accordingly will be

forced to curb aggressive – and desirable – competitive bidding for fear of triggering unwarranted liability; and baseless litigation will be encouraged. The Court should reject that approach.

A. *Brooke Group*'s Requirement That A Plaintiff Prove Below-Cost Pricing And A Dangerous Probability Of Recoupment Should Apply To Predatory Buying Claims.

The Court in *Brooke Group* addressed predatory pricing claims in the context of predatory selling, holding that antitrust liability attaches only if the product is sold at a loss – if revenues are below the seller's costs – and only if there is a dangerous probability that the seller may recoup its losses.

When a *buyer* either has monopoly power or a dangerous probability of obtaining monopoly power in a relevant market – a condition that economists term "monopsony" or a dangerous probability of monopsony – the same standard should apply to claims that the buyer has used price as an anticompetitive weapon by engaging in predatory pricing in its purchasing activities.

1. *This Court's Predatory Pricing Decisions, Culminating In* Brooke Group, *Establish That Objective Rules Are Essential To Distinguish Predatory From Competitive Pricing.*

Applying the principles just discussed regarding the conduct element of Section 2, this Court has viewed with great skepticism a plaintiff's allegations that one of its competitors engaged in predatory pricing, sacrificing available profits in an effort to drive competitors out of business. The Court therefore has insisted that antitrust plaintiffs who allege predation satisfy rigorous, and objective, standards of proof.

The Court explained in the context of predatory pricing by sellers that such a scheme "is by nature speculative" because the defendant must "forgo profits that free competition

would offer." *Matsushita*, 475 U.S. at 588. For predatory pricing conduct to be "rational," the defendant

> must have a reasonable anticipation of recovering, in the form of later monopoly profits, more than the losses suffered. * * * [T]he success of such a scheme is inherently uncertain: the short-term loss is definite, but the long-term gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits.

Id. at 588-589. "For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried and even more rarely successful." *Id.* at 589.

Moreover, "[s]ince the losses" from a predatory scheme "accrue before the gains, they must be 'repaid' with interest" for the scheme to succeed. *Matsushita*, 475 U.S. at 592. This economic reality tends to make predation "self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly" to the defendant. *Id.* at 595. For this reason, "it is plain that the obstacles to the successful execution of a strategy of predation are manifold, and the disincentives to engage in such a strategy are accordingly numerous." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 121 n.17 (1986) (citation and internal quotation marks omitted).

The Court also has recognized that vigorous pricing conduct that inefficient rivals label predatory "often is the very essence of competition. Thus, mistaken inferences in [such] cases * * * are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. Courts "'must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.'" *Ibid.* (quoting *Barry Wright*

Corp. v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.)); see also *Cargill*, 479 U.S. at 121 n.17 (emphasizing that "[c]laims of threatened injury from predatory pricing must * * * be evaluated with care" for the reasons identified in *Matsushita*).

"There is * * * a general agreement that the antitrust cour[illegible]ajor task" in the context of standards for identifying unla[illegible]l pricing "is to set rules and precedents that can segregate the economically harmful price-cutting goats from the more ordinary price-cutting sheep, in a manner precise enough to avoid discouraging desirable price-cutting behavior." *Barry Wright*, 724 F.2d at 231-32 (Breyer, J.). And in doing so, it is emphatically *not* the goal of the antitrust laws to insulate inefficient competitors from the effects of hard competition. See *ibid.*

In response to these fundamental principles, the Court in *Brooke Group* articulated its two-part test for assessing claims of predatory pricing behavior by sellers. "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. * * * As a general rule, the exclusionary effect of prices above a relevant measure of costs either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting." 509 U.S. at 222-23.

If below-cost pricing is established,

> [t]he second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. * * * Recoupment is the ultimate object of an unlawful

> predatory pricing scheme; it is the means by which a predator profits from predation.

Id. at 224. Absent such proof that the alleged predator "would likely" recoup its losses, "the plaintiff's case has failed." *Id.* at 226.

The recoupment standard is demanding: the plaintiff must show that the predatory selling would have "the intended effects on the firm's rivals" and "that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it." *Brooke Group*, 509 U.S. at 225. This is not an invitation for unguided speculation by the plaintiff about the circumstances in a hypothetical "but for" world. Rather, such a showing "requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market." *Id.* at 226. When the characteristics of the market show that this standard cannot be met, "summary disposition of the case is appropriate." *Ibid.*

Indeed, as Former Assistant Attorney General Pate explained, "[t]he second part of the [*Brooke Group*] standard is especially important because there are a variety of situations in which it can readily be determined that an alleged predator has no prospect of future monopoly pricing." R.H. Pate, *The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct*, at 21 (Oct. 23, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/202724.pdf; see also *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989) (Easterbrook, J.). The recoupment test often provides a practical means of screening out insubstantial claims without the expense and other burdens of a full-blown trial.

2. *The* Brooke Group *Test Should Govern Predatory Buying Claims Because The Rationale Of The Court's Predatory Selling Decisions Applies Just As Strongly In The Predatory Buying Context.*

Predatory buying allegations rest on assertions substantively identical to those underlying claims of predatory selling. In predatory selling, the plaintiff's contention is that its competitor cut prices in order to drive the plaintiff out of business and obtain or enhance its monopoly power. Similarly, the predatory buying plaintiff's claim – as here – is that its competitor has bid up prices for a key input in order to drive the plaintiff out of business. Once the competitor is eliminated, the defendant supposedly will exercise its monopsony power to decrease what it is required to pay for the input and reap monopoly profits due to the lack of competition from other buyers.

Both types of claim involve the alleged use of unilateral pricing for anticompetitive purposes, and both assert that the defendant is forgoing profits in the short term in order to reap supracompetitive profits in the future. In addition to this strong substantive similarity, claims of predatory buying carry the very same risks of penalizing legitimate competition that led the Court in *Brooke Group* to adopt clear, objective standards for separating lawful and unlawful pricing on the sell-side. Those standards should apply to claims of predatory buying as well.

a. A predatory buying plaintiff must prove that the defendant's costs exceeded its revenues.

(i) False positives on the buy side punish desirable competition. The substantial risk of deterring legitimate procompetitive conduct emphasized by the Court in the predatory selling context is just as significant with respect to predatory buying claims, because here too the conduct chal-

lenged by the plaintiff is indistinguishable from core competitive behavior. Accordingly, the need to avoid false positives and overdeterrence, which may be effected through the use of objective liability standards, means that a predatory buying plaintiff must prove that the defendant's costs exceeded its revenues.

Nothing is more central to the operation of market forces than price competition. Sellers lure customers by reducing price; buyers attract suppliers by increasing price. Indeed, "[p]rice is the 'central nervous system of the economy.'" *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978) (quoting *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940)).

A buyer's "competitive instinct is to bid up price," and "[a]ntitrust law rarely stops the buyer of a service from trying to determine the price or characteristics of the product that will be sold." *Kartell*, 749 F.2d at 925 (Breyer, J.). Thus, just as price cuts by sellers generally are desirable, competition by buyers that increases the price paid to suppliers "is almost certainly moving price in the 'right' direction." *Barry Wright*, 724 F.2d at 234 (Breyer, J.). The mechanism by which a firm engages in predatory buying – increasing prices paid to sellers – "'is the same mechanism by which a [bidding] firm stimulates competition,'" which means that "'mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Brooke Group*, 509 U.S. at 226 (quoting *Cargill*, 479 U.S. at 122 n.17) (ellipsis in original).

Certainly, nothing in *Matsushita* and *Brooke Group* indicates that the Court's concern with "false positives" is somehow restricted to situations involving reductions in output price. To the contrary, *Brooke Group* used "legitimate price-cutting" as only one example of the sort of "competition on the merits" that an overly restrictive predatory pricing rule could chill. 509 U.S. at 223; accord *Trinko*, 540 U.S. at 414

(referring generally to need to take into account the risk of false positives in crafting Section 2 standards); *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (deterrence concerns arise whenever the applicable legal rule threatens to "'inhibit management's exercise of independent business judgment'") (citation omitted).

A company's decision to purchase an input at prices that one of its competitors believes to be excessive – and thereby obtain a larger quantity of the input – ordinarily has a number of legitimate, pro-competitive explanations. As Professor Salop has explained, "increased purchases could be driven by an increase in demand for the firm's product or a new business plan that involves market share growth," or by "the firm adopting a new production process that uses the input more intensively," or "could reflect changes in inventory policy, such as where the firm chooses to hold more inventories to reduce the likelihood of shortages or to hedge against future input price increases." S. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 ANTITRUST L.J. 669, 682-83 (2005) (footnotes omitted).[3]

In addition, "firms should not be forced to make predictions at their peril about future demand in uncertain markets. Subsequent 'surpluses' may reflect prior miscalculations that were quite within reason at the time they were made." IIIA

---

[3] We note that Professor Salop acted as a consultant to Weyerhaeuser in this case. On the other hand, two articles relied upon by the Ninth Circuit were written by, respectively, a paid consultant and an expert witness for plaintiffs in this case. See Pet. App. 9a n.14 (citing J. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 655 (2005), and R. Zerbe, *Monopsony and the* Ross-Simmons *Case: A Comment on Salop and Kirkwood*, 72 ANTITRUST L.J. 717, 724 (2005)).

P. Areeda & H. Hovenkamp, ANTITRUST LAW, ¶ 768a4, at 143 (2d ed. 2002).

Here, for example, the record showed that Weyerhaeuser invested in its sawmills to increase efficiency. As a result of those investments, Weyerhaeuser was able to produce a larger amount of saleable lumber per log than some of its competitors. See page 7, *supra*. Because it realized more lumber and more sales revenue from each log than some of its competitors, Weyerhaeuser could afford to pay more for each log and continue to make a profit; its less efficient competitors faced a harder time making a profit at the log prices that Weyerhaeuser could afford to pay. See *ibid.*

Given the numerous legitimate reasons for bidding up the price of an input, there is a very substantial risk that competitive behavior could be captured by a vague liability standard. Such false positives could "'end up [] discouraging legitimate price competition.'" *Matsushita*, 475 U.S. at 594 (quoting *Barry Wright*, 724 F.2d at 234). As the Solicitor General concluded in the government's amicus brief supporting certiorari in this case, "just as lower prices for outputs are often a sign of competition, so too are higher input prices * * *. Antitrust liability premised on such activity, without evidence of losses and a dangerous prospect of recoupment, could chill substantial legitimate competitive activity." U.S. Cert. Am. Br. 12.

(ii) An objective cost-revenue standard is needed to govern predatory buying claims. The danger that subjective liability standards will lead to false positives that suppress competition means that buyers need an objective standard for assessing the permissibility of pricing activity, so they can determine easily whether a bid is lawful or unlawful and engage in the hard competition that the antitrust laws encourage. The cost-revenue test – which asks whether the business "can make a profit on its product if it pays the proposed amount for the input" – is an easily-administered

standard that allows businesses to conform their conduct to the requirements of the antitrust laws without chilling essential price competition. At the same time, so long as inputs are not purchased at an unprofitable level, purchases at that level can never exclude an equally efficient competitor.

Moreover, because the barriers to a successful scheme of predatory buying are at least as high as the barriers to successful predatory selling, there can be no concern that application of *Brooke Group*'s objective standard to predatory buying will open the door to significant amounts of anticompetitive activity. As two leading scholars of monopsony have observed:

> Successful monopsony predation is probably as unlikely as successful monopoly predation. First, the predatory firm would have to raise the price not only for the inputs it originally purchased, but would have to be prepared to purchase all of that input currently available in the market at the higher price. * * * In addition, in the long run, input suppliers that could substitute into the production of this input would have an incentive to do so, making the financial burden on the predatory firm even greater.
>
> Second, the firm has the problem of what to do with the input. One possibility is to destroy it; another is to store it. Any effort to process the input into its final output would likely increase the quantity of that output available and depress its price. All of these options create further financial burdens.

R. Blair & J. Harrison, MONOPSONY 66-67 (1993). Predatory buying, like predatory selling, is self-deterring, as "[m]onopoly prices eventually attract entry." F. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3 (1984). Supracompetitive profits by a monopsonist will attract new buyers into the market.

To be sure, as with predatory selling, application of *Brooke Group*'s cost-revenue test on the buy-side may allow a monopolist to use above-cost pricing strategies that "induce or reestablish supracompetitive pricing" (509 U.S. at 224). In the buying context, however, as in the selling context, application of a standard that would capture 100% of such anticompetitive conduct "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting" (*id.* at 223). As the leading commentators in this area have observed, the problem with imposing liability on predatory pricing schemes where the defendant's revenues exceed costs

> is not that we doubt [such schemes'] existence or even their anticompetitive consequences. Rather, identifying them in the particular case without chilling aggressive, competitive pricing is far beyond the capacity of any antitrust tribunal. Once we cross the threshold and permit prices above cost to be condemned as predatory, we throw the doors open to all kinds of speculation about the pricing strategies of large firms – speculation that judges ordinarily address by opening discovery, including evidence of presumed anticompetitive intent, and making a jury the final decision-maker.

III Areeda & Hovenkamp, *supra*, ¶ 735a, at 364-65; accord *Schor* v. *Abbott Laboratories*, 2006 WL 2062117, at *4 (7th Cir. July 26, 2006) (Easterbrook, J.) (reaffirming price-cost standard even though it might not detect every practice with an anticompetitive effect because "[t]he search itself (and the risk of error in the judicial process) has much more chance of condemning a beneficial practice than of catching a detrimental one").[4]

---

[4] Respondent asserts (Br. in Opp. 20-21) that evidence of intent to harm competitors – such as the evidence introduced in this case (see Pet. App. 19a-20a) – is a sufficient substitute for *Brooke Group*'s objective standard. It is well-settled, however, that evi-

Indeed, failing to apply *Brooke Group* here would allow predatory *selling* plaintiffs to avoid *Brooke Group* by recasting their predatory selling claims as predatory buying claims. In many cases in which a seller can allege predatory selling by a larger competitor, the potential defendant also may be a significant participant in the upstream input market Cf. *Cargill*, 479 U.S. at 114 (competitor challenging a merger on the ground that the merged company would both increase the cost of inputs and cut prices in the downstream market). If *Brooke Group* did not apply to predatory buying, the former predatory selling plaintiff could drop its claim regarding the downstream market, focus on the competitor's alleged predatory buying, and thereby avoid the need to satisfy an objective standard. That result would elevate pleading over substance and produce a wave of unjustified predatory buying lawsuits.[5]

---

dence of intent to damage competitors is of little value in antitrust analysis – especially when the plaintiff is complaining that it was injured by *hard competition*. After all, "a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition. * * * [S]tatements of this sort readily may be misunderstood by lawyers and jurors, whose expertise lies in fields other than economics." *A.A. Poultry Farms*, 881 F.2d at 1402 (Easterbrook, J.); R. Posner, ANTITRUST LAW 214-15 (2d ed. 2001) (statements of "competitive prowess" are "[e]specially misleading" to judges and juries). Such a standard also would provide no guidance whatever to businesses seeking to comply with the law; it would have precisely the same ill effects as the vague standard endorsed by the court below. See pages 38-44, *infra*.

[5] The government notes that "this case does not involve a claim that the defendant engaged in monopolization or attempted monopolization of the *downstream* market by engaging in predatory bidding in the *upstream* market." U.S. Cert. Am Br. 14-15 n. 6 (emphases in original). We agree. The jury's determination that there is no relevant market for finished alder lumber (see page 5, *supra*) means that Weyerhaeuser lacked market power in the

b. Proof of recoupment also is essential to a predatory buying claim.

In addition, like predatory selling, predatory buying is irrational if the defendant cannot recoup its losses: "the buyer must be able to 'profit' from the lower price for a long enough period of time that it can make up its predatory 'investment.'" Blair & Harrison, MONOPSONY, *supra*, at 67. The Court's determination in *Brooke Group* that "[r]ecoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation" (509 U.S. at 224) thus applies with full force to predatory buying. Indeed, that is precisely what Ross-Simmons argued that Weyerhaeuser was attempting to do. Br. in Opp. 1-2 ("here a dominant buyer with market power forced competitors out of business by intentionally driving up the costs of and denying competitors access to a limited supply of natural resource inputs essential for production, with the specific intent of driving input prices down after rivals were forced to exit") (emphasis omitted).

Predatory buying without a dangerous probability of recoupment makes no sense. This Court has long recognized that "[i]f the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted." *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 468-69 (1992); *Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 528 (5th Cir. 1999) ("to survive summary judgment a plaintiff must have evidence that the predation scheme is economically rational"). Here, as in the predatory selling context, without proof of recoupment "the plaintiff's case has failed." *Brooke Group*, 509 U.S. at 226.

---

downstream market. This case accordingly provides no occasion for the Court to address how the *Brooke Group* test applies when the defendant may be able to recoup its losses in more than one market.

3. Courts Have Recognized In A Variety Of Contexts That Allegations Of Buy-Side Predation Should Be Reviewed Under Standards Equivalent To Those That Apply To Parallel Claims Of Sell-Side Predation.

The conclusion that similar standards should apply in assessing predatory buying and predatory selling is not surprising. Courts have recognized in a variety of contexts that monopsony and monopoly are mirror images of one another, and that the legal standards used to judge the legality of conduct in one context generally are appropriately applied to judge equivalent conduct in the other. If anything, economic analysis indicates that monopsony should be treated more leniently than monopoly in some circumstances.

The Seventh Circuit, speaking through Judge Posner, has expressly stated that monopsony pricing "is analytically the same as monopoly or cartel pricing and so treated by the law." *Khan* v. *State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996), rev'd on other grounds, 522 U.S. 3 (1997). Other courts have reached the same conclusion. *Todd* v. *Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001); *United States* v. *Syufy Enters.*, 903 F.2d 659, 663 n.4 (9th Cir. 1990) ("[m]onopsony and monopsony power are the equivalent on the buying side of monopoly and monopoly power on the selling side"); *Houser* v. *Fox Theatres Mgmt. Corp.*, 845 F.2d 1225, 1228 & 1231 (3d Cir. 1988) (applying principles of *Matsushita* and *Monsanto* to monopsony claim); *Betaseed, Inc.* v. *U & I Inc.*, 681 F.2d 1203, 1221 (9th Cir. 1982) (applying sell-side tying standard to a buy-side tie).[6]

---

[6] To be sure, antitrust standards developed in the buy-side context must take account of the "mirror image" nature of monopsony by, for example, focusing on the characteristics of the market for purchases of the good. *Todd*, 275 F.3d at 202, 211.

This Court has many times examined allegedly anticompetitive uses of buying power without ever intimating that different rules apply depending upon whether buy- or sell-side conduct was involved. See, *e.g.*, *FTC* v. *Consolidated Foods Corp.*, 380 U.S. 592, 593-94 (1965); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209-10 (1959); *FTC* v. *Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 393, 395 (1953); *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948); *United States* v. *Griffith*, 334 U.S. 100, 107 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 803-04 (1946); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 181 (1944); *Socony-Vacuum*, 310 U.S. at 178, 216, 219-20.

The Department of Justice's Antitrust Division agrees that "[m]onopsony is the mirror image of monopoly." Testimony of R.H. Pate, Assistant Attorney General Antitrust Division, Before the Committee on the Judiciary United States Senate Concerning Antitrust Enforcement in the Agricultural Marketplace, at 3 (October 30, 2003), *available at* http://www.usdoj.gov/atr/public/testimony/201430.pdf. "The exercise of market power by buyers ('monopsony power') has adverse effects comparable to those associated with the exercise of market power by sellers." U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, at § 0.1 (1997).

Finally, "most antitrust scholars" likewise have concluded that "asymmetric treatment of monopoly and monopsony has no basis in economic analysis." R. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 590-91 (2005). The leading antitrust treatise states that "monopsony power generally has harmful effects analogous to those of monopoly." IV Areeda & Hovenkamp, *supra*, ¶ 943e, at 231; see also Blair & Harrison, MONOPSONY, *supra*, at 36 ("Pure monopsony is the demand side analog of monopoly. * * * The economic objections to monopoly and

monopsony are similar: the exercise of market power reduces social welfare"); D. Carlton & J. Perloff, MODERN INDUSTRIAL ORGANIZATION 107 (4th ed. 2005) ("Monopsony is the flip side of monopoly."); A. Gavil, W. Kovacic & J. Baker, ANTITRUST LAW IN PERSPECTIVE 1106 (2002) (same).[7]

An important practical consideration points toward the same conclusion. Section 2 standards – especially standards relating to price competition – should to the extent possible be capable of application by business people in the ordinary course of running their businesses. Every business both buys and sells. Requiring lay decision makers to take account of different legal standards depending upon whether they are buying or selling would cause paralyzing confusion.

4. The Antitrust Laws Protect Aggressive Competition By Buyers Because Buyer Competition Promotes Consumer Welfare.

The Ninth Circuit opined that *Brooke Group* "established a high liability standard for sell-side predatory pricing cases" because "consumers benefit from lower prices and * * * cutting prices often fosters competition"; in contrast, the court continued, the same benefits "do not necessarily result from predatory bidding the way they do from predatory [selling]." Pet. App. 8a-9a. The court of appeals concluded that "the

---

[7] Notably, the single article cited by respondent for the proposition that "monopsony and monopoly are not completely analogous" concludes that the differences the authors perceive between monopsony and monopoly should lead to *less searching scrutiny* of monopsony under the Sherman Act. Br. in Opp. 22 (citing J. Jacobson & G. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1, 5, 11, 43-44 (1991)). The leading antitrust treatise agrees that mergers producing high concentration among buyers generally are less of a threat to competition than those producing a similar level of concentration among sellers, especially where – as here – the downstream market is competitive. IV Areeda & Hovenkamp, *supra*, ¶¶ 980-82.

standard for liability in this predatory bidding case need not be as high as in predatory pricing cases." *Id.* at 11a.

The court of appeals' rejection of *Brooke Group* thus rests on its determination that the risk of chilling legitimate price competition among buyers is not as deserving of antitrust concern as the risk of chilling legitimate price competition among sellers. This novel assertion[8] is wrong. This Court's decisions make clear that the antitrust laws provide the same level of protection to competition among buyers as to competition among sellers; by doing so, those laws both protect sellers directly and, by promoting buy-side competition, necessarily promote consumer welfare.

To begin with, this Court has squarely rejected the idea that the antitrust laws apply differently to sellers than to buyers:

> The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. * * * The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Mandeville Island Farms, 334 U.S. at 236; see also, *e.g.*, *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 493 (1940).

Indeed, "[t]he passage of the Sherman Act was strongly influenced by injuries inflicted upon business firms; they were among the most obvious victims of the trusts. * * * The opportunity to sell at competitive prices has been protected as zealously as the opportunity to buy at competitive prices." W. Jones, *Concerted Refusals To Deal and the Producer Interest in Antitrust*, 50 OHIO ST. L.J. 73, 88, 89 & n.

---

[8] The Ninth Circuit cited no authority of this (or any other) Court in support of this observation.

95 (1989) (citing sources). The Antitrust Division agrees: "While we often speak of consumers as the targeted beneficiary of antitrust enforcement, suppliers also benefit, by having healthy incentives to provide the best products and services they can, with the expectation that they will be able to do so free from anticompetitive interference." Pate Testimony, *supra*, at 5.[9]

Moreover, the Ninth Circuit was wrong in simply assuming the absence of any connection between seller welfare and consumer welfare.[10] To begin with, it is well-established that the exercise of monopsony power to depress prices "is as bad as a monopolistic increase in price" because it diminishes the suppliers' incentive to provide goods, thereby decreasing the output available to consumers (and consequently leads to increased prices for consumers). *Ball Mem. Hosp., Inc.* v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.); see also Pate Testimony, *supra*, at 5 ("If a buyer obtains market power * * *, and thereby is able to depress prices for the inputs it purchases below competitive

---

[9] Acceptance of the Ninth Circuit's approach would create considerable uncertainty about the application of the antitrust laws to buy-side anticompetitive behavior, such as actions against bid-rigging cartels and challenges to mergers based on the threat of buy-side anticompetitive effects. Would application of the *per se* rule against price fixing to buy-side conduct require proof that such conspiracies virtually always harm consumer welfare? And would merger challenges depend upon proof of the risks posed to consumer welfare by the particular merger?

[10] Inexplicably, the Ninth Circuit indicated that an impact on consumer welfare was critical, but did not engage in any analysis of the ways in which consumers actually are benefited by competition among buyers – either generally or in the context of this case. Notwithstanding Weyerhaeuser's lack of market power in the downstream market (see page 5, *supra*) – the court below seemed to assume an adverse effect on consumers from the alleged predatory conduct.

levels, then producers of those inputs will have depressed incentives to produce, which will result in too few resources utilized to produce the inputs compared to what would be available in a competitive market. This is likely to harm both suppliers and consumers.").[11]

Settled economic principles also establish that the converse is equally true: protecting vigorous buy-side competition that raises prices *for* sellers necessarily benefits the ultimate purchaser by encouraging innovation and increased production *by* sellers. That point is forcefully made by the *amici* in this case. See, *e.g.*, Business Roundtable Cert. Am. Br. 12 ("Because the price paid for the input is higher, any suppliers that can substitute into the production of the input will have an incentive to do so. More inputs will result in more finished products for sale to consumers, and more finished products on the market will result in lower prices.") (citation omitted); BellSouth Cert. Am. Br. 10.

In addition, as we have discussed (see page 21, *supra*), to the extent a buyer engaging in vigorous price competition obtains more inputs to process at its more efficient facility, the greater resulting output will mean an increase in supply in the downstream consumer market – which in a competitive market should produce a correspondingly lower price to consumers purchasing goods in that market. That effect is visible in this case: it is undisputed that Weyerhaeuser's greater efficiency allowed it to make more productive use of logs (see page 7, *supra*), and thus to provide more lumber per log to consumers than could a less efficient rival like plaintiff.

---

[11] See also R. Blair & J. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 299 n. 17 (1991); *Telecor Communications, Inc.* v. *Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1135-36 (10th Cir. 2002) (suppressing buy-side competition leads to reduced production and quality, and higher prices for consumers), cert. denied, 538 U.S. 1031 (2003).

It is possible that the court of appeals was motivated by a different concern: it might have concluded that *Brooke Group*'s focus on protecting procompetitive conduct rested solely on the fact that predatory selling initially produces "lower aggregate prices in the market" (509 U.S. at 224). Because predatory buying involves higher prices, the Ninth Circuit may have believed *Brooke Group* to be inapplicable. But this Court in *Brooke Group* linked its observation about lower prices to enhancement of consumer welfare (*ibid.*), and – as we have discussed – the conduct here is likely to increase consumer welfare.

It is a fundamental tenet of our economic system that prices fall and consumers benefit when the most efficient producers are able to obtain all the inputs they need. See *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958) ("[the Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources"). The court of appeals accordingly was wrong in its view that application of a legal standard that chills vigorous price competition among buyers does not implicate the core concerns of the antitrust laws to the same extent as one that chills competition among sellers.

5. *The Ninth Circuit's Elasticity Exception Makes No Legal, Economic, Or Factual Sense.*

The Ninth Circuit also stated that regardless of the general standard governing predatory buying claims, the *Brooke Group* standard should not apply here because what the court termed the "relatively inelastic" nature of the alder log market "does not readily allow for market expansion." Pet. App. 11a. Because higher log prices supposedly would not increase supply, the court concluded consumers could not benefit from increased price competition among log buyers. That analysis was wrong in every respect.

For one thing, there is no factual basis for the court's assertion. The jury was not asked to make any finding on the matter, and the Ninth Circuit's characterization of the alder log market was based on highly implausible extra-record material – a law review article by plaintiff's expert (see Pet. App. 11a n.20) – and not on anything in the evidentiary record in this case.

The record actually shows that, while some alder is harvested on a "come-along" basis (see pages 3-4, *supra*), a substantial amount is not. Indeed, the record indicates that nearly one-third of alder is harvested on an independent basis (J.A. 750a) and that alder yields accordingly can be expected to rise as price increases. Even the remainder of the alder supply is sensitive to price: higher prices lead timber owners to market logs that they otherwise would have withheld from sale. See Campbell Cert. Am. Br. 12-14; see also *id.* at 13 n.5 (the timber market is "quintessentially elastic").

The lower court also erred in assuming that expansion of the supply of logs is the only way that buy-side price competition can enhance consumer welfare. As we have discussed, increased purchases by more efficient processors leads to expanded supply in the downstream market, which leads to lower consumer prices. Any higher log prices paid by more efficient producers to expand their more efficient production thus directly benefit consumers. Elasticity of supply is simply irrelevant to this beneficial effect upon consumers.[12]

---

[12] The government pointed out, moreover, that "it is precisely when supply is inelastic that efforts by relatively efficient firms to expand will lead to an increase in input prices. Thus, the Ninth Circuit's rule will apply the greatest antitrust scrutiny in those markets in which procompetitive expansion is likely to increase input prices and injure competitors (but not competition)." U.S. Cert. Am. Br. 15 n.8.

More fundamentally, superimposing an elasticity of supply test on top of the *Brooke Group* standard would eliminate all of the benefits of the objective rule adopted in that case. As the Solicitor General explained, "the court of appeals' suggested approach would necessitate a complex and costly market-by-market assessment of supply elasticity, frustrating the compelling need for clear and easily administrable rules to govern pricing behavior." U.S. Cert. Am. Br. 16. No business person would be able to know in advance whether a jury might determine that a market was relatively inelastic; accordingly, every buyer in every sector of the economy would have to take account of the possibility that the objective *Brooke Group* standard would not govern the legality of its pricing decisions.[13] The uncertainty produced by the "relative inelasticity" test would reintroduce the precise chilling effect that the *Brooke Group* standard was designed to eliminate.

6. There Is No Separate "Overbuying" Claim In This Case.

Ross-Simmons argued in the court of appeals that it had proven that Weyerhaeuser engaged in "overbuying" – a claim allegedly distinct from its contentions regarding predatory overbidding. Resp. Ct. App. Br. 53-56. The claim apparently encompasses assertions that "Weyerhaeuser bought substantially more alder sawlogs than it needed for its Long-

---

[13] See American Meat Institute Cert. Am. Br. 10 ("We cannot know what the jury would have found about the elasticity of alder sawlogs, but more importantly, we cannot know what a future jury would do if called upon to second-guess – under the subjective 'higher than necessary' standard – the thousands of individual pricing decisions AMI's members and innumerable other companies make each year. Faced with the prospect of treble damages for pricing 'too high,' some companies will likely be unwilling, at least on the margin, to bid as high as they otherwise might in a competitive market.").

view mill" as well as intimations that some of these logs were not usable. *Id.* at 53, 54.

A separate overbuying claim makes even less sense than a predatory buying claim. What objective standard could a court apply in determining whether a business purchased "too much" of a particular input? Purchasing decisions depend upon a host of factors, such that identifying "overbuying" "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate" purchasing. *Brooke Group*, 509 U.S. at 223.[14]

Moreover, plaintiff's distinction between predatory buying and overbuying makes no economic sense. "Buying too much" will produce higher prices, at least in the short term, until sellers increase output. And paying "too much" inevitably results in purchases of a greater quantity of goods, as sellers are motivated to increase their output and the alleged overbuyer must increase the quantity it purchases so as to maintain the higher price. The claims therefore are economically identical; in each case, the defendant will have paid more and bought more.

As a consequence, recognizing a separate claim of "overbuying" without clearly-defined objective characteristics would enable every predatory buying plaintiff to avoid the *Brooke Group* standard simply by recasting its predatory buying allegations as "overbuying" – targeting the quantity of input purchased by the defendant rather than the purchase price. That would render *Brooke Group* a dead letter in the buying context, and threaten to do so in the selling context as well, where predatory selling plaintiffs would no doubt begin

---

[14] At a minimum, any claim of overbuying would necessarily require proof of recoupment. Like "paying too much," "buying too much" involves incurring deliberate losses; it therefore would not be rational absent a dangerous probability that the buyer could recoup its "predatory investment."

to assert "overselling" claims targeting the alleged "dumping" of large quantities of product into a market in order to "push out" small competitors.

In all events, any "overbuying" is accounted for fully in *Brooke Group*'s cost-revenue comparison. Here, for example, the total cost of all of Weyerhaeuser's purchases of alder logs in the Pacific Northwest would be included on the cost side of the ledger. To the extent "overbuying" led to production that could not be sold, or was sold at a low price because of oversupply in the downstream market, those lower revenues would adversely affect the cost-revenue comparison. And if Weyerhaeuser stockpiled logs, its increased costs without any compensating revenues would have an even more drastic adverse effect, especially when – as here – the cost of the input is a large percentage of the cost of the downstream products.

This would be true even if the defendant made no use of some of the inputs that it purchased (something that did not occur here).[15] There are any number of legitimate reasons that might occur: the defendant might miscalculate its needs; there might be a change in demand for the defendant's product; it might be necessary for the defendant to buy more inputs than it will use so as to guarantee a source of supply.

---

[15] The district court referred to evidence "that [Weyerhaeuser] was accumulating far more logs than necessary at its Longview mill, even while excessive inventory spoiled in the yard." Pet. App. 34a. But there is no evidence whatever that during the alleged predation period Weyerhaeuser purchased logs that later spoiled or otherwise were not put to productive use. Rather, the only evidence of spoilage related to incidents in 1989 and 1993 (see J.A. 185a-186a, 253a-254a), a time that, in plaintiff's view, Weyerhaeuser did not have monopoly power and that was long before the 1996-2001 predation period alleged by plaintiff. See page 5, *supra*. Indeed, Ross-Simmons earned record-level profits in 1989 and 1993. J.A. 153a-155a.

But whatever the explanation, the cost of the unused inputs would have to be taken into account in the cost-revenue analysis. To the extent a defendant purchased and discarded a significant amount of an input, those costs likely would have a significant impact on this analysis. But there is no basis for advocating a separate standard to assess such claims.

There also is no evidence here that Weyerhaeuser's purchases made it impossible for the plaintiff to obtain the input at any price – that Weyerhaeuser both "cornered the market" and failed to make productive use of the inputs it purchased. Cf. III Areeda & Hovenkamp, *supra*, ¶ 702, at 151 (monopolist's hiring of all available individuals with particular expertise is per se legal as long as the defendant actually uses the acquired employees). The record leaves no doubt that Ross-Simmons always was able to obtain alder logs to process at its mill. J.A. 181a, 218a, 406a-407a, 409a-412a.[16] Its complaint was only that Weyerhaeuser was buying "too many" logs. That provides no basis for a separate "overbuying" claim.

B. The Ninth Circuit's "Fair Price" Test Penalizes Legitimate Competition And Provides No Guidance For Juries Faced With Predatory Buying Claims.

Having rejected *Brooke Group*, the court below determined that a defendant should be held liable for predatory buying whenever a jury concludes that the defendant "purchased more [product] than it needed or paid a higher price for [the product] than necessary," and that it did so "to pre-

---

[16] Ross-Simmons did begin to have trouble obtaining logs in 2000, but only because it was not paying timber owners on a timely basis. J.A. 406a-407a, 427a, 430a-431a, 521a-523a. That fact obviously does not suggest that Weyerhaeuser had "cornered the market" on alder logs.

vent the Plaintiffs from obtaining the [product] they needed at a fair price." Pet. App. 7a n.8. That conclusion cannot be correct. It would be hard enough for an expert administrative agency to determine what price was "necessary" or "fair"; it is quite impossible for "a generalist antitrust court" (*Trinko*, 540 U.S. at 414) – let alone a jury – to make sense of that test.

The Ninth Circuit standard invites the jury to punish legitimate price competition and imposes a standard that offers no guidance whatever for companies seeking to comply with the law. It does not provide an acceptable alternative to the *Brooke Group* test; rather, the test formulated by the Ninth Circuit would inflict significant harm upon the nation's economy. Indeed, even if the Court were to disagree with our view that both elements of the *Brooke Group* standard apply in the buy-side context, it should reject the wholly vacuous standard adopted below.

First, this Court has emphatically rejected use of a closely analogous "reasonableness" test under Section 1 of the Sherman Act. Then-Judge Breyer has explained:

> As the Supreme Court stated * * *, "[w]e should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable – a determination which can be satisfactorily made only after a complete survey of our economic organizations and a choice between rival philosophies."

Kartell, 749 F.2d at 929 (quoting *United States* v. *Trenton Potteries Cos.*, 273 U.S. 392, 397-98 (1927)); see also *United States* v. *Trans-Missouri Freight Ass'n*, 166 US. 290, 331-32 (1897); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 283-84 (6th Cir. 1898) (Taft, J.), aff'd, 175 U.S. 211 (1899). Any contrary conclusion would "require judicial estimation of free market forces" (*Trinko*, 540 U.S. at 410 n.10), an approach this Court has decisively repudiated.

The Ninth Circuit's approach is wholly inconsistent with this Court's rejection of a reasonableness test. The question whether a price is "fair" or "necessary" is, if anything, *more* subjective and indeterminate than that whether it is "reasonable." See *Kartell*, 749 F.2d at 927-28 (rejecting antitrust claim based on allegation that buyer's payments were "too low" because of courts' inability to determine reasonableness of prices).

Second, the court of appeals' standard inevitably will lead to wholly arbitrary and unpredictable results – precisely the opposite of what this Court has required of legal standards governing allegedly anticompetitive pricing. Indeed, if the Ninth Circuit had set out to maximize capricious judicial outcomes with respect to the central issue of price, it could not have done better than the standard it announced in this case. Again quoting then-Judge Breyer, writing in the context of an alleged "price squeeze":[17]

> [H]ow is a judge or jury to determine a "fair price"? * * * Is it the price the competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to determine the proper size of the price "gap"? Must it be large enough for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And

---

[17] A "price squeeze" may arise when a firm operates at two levels of an industry and its competitors at one level are its customers at the other. "[A] price squeeze occurs when the integrated firm's price at the first level is too high, or its price at the second level is too low, for the independent to cover its costs and stay in business." *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 18 (1st Cir. 1990) (Breyer, J.).

> how should the court respond when costs or demands change over time, as they inevitably will?

Town of Concord v. *Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990). The impossibility of giving consistent (or even intelligible) answers to these questions makes it inevitable that the outcomes in individual cases decided under a "fair" and "necessary" standard will be unpredictable and often erroneous. As Judge Easterbrook has put it, a "fog-bound instruction * * * ensures that confusion and random results will emerge," along with "false positives and false negatives." Easterbrook, *On Identifying*, *supra*, at 978.[18]

Third, the Ninth Circuit held that a firm may be found liable whenever it cuts into a less efficient competitor's profits by moving aggressively to safeguard a supply of essential inputs, if a jury concludes that the competitor was deprived of a "fair" price. But "this conception of fairness is, of course, antithetical to both competition and economic efficiency." I Areeda & Hovenkamp, *supra*, ¶ 111d, at 103. The Court repeatedly has indicated that the antitrust laws do not "protect competitors from the loss of profits" caused by a rival's aggressive competition, explaining that a contrary approach would have the "perverse" effect of "render[ing] illegal any decision by a firm to cut prices in order to increase market share." *Cargill*, 479 U.S. at 116.

The holding below *rewards* inefficiency; under the Ninth Circuit's rule, the more inefficient a competitor is, the more solicitous its rivals must be. But businesses that take advan-

---

[18] Compounding the problem, juries that are asked whether the price paid by a defeated rival for inputs was "fair" may not fully appreciate that "[c]ompetition is a ruthless process. A firm that reduces costs and expands sales injures rivals – sometimes fatally. * * * These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds. The antitrust laws are for the benefit of competition, not competitors." *Ball Mem. Hosp.*, 784 F.2d at 1338 (Easterbrook, J.).

tage of their low cost structures and efficient operations to out-compete their less-efficient rivals are engaging in conduct that is *encouraged* by the antitrust laws: when, as in this case, the nature of the complaint is that the plaintiff was damaged by aggressive competition, "[i]t is inimical to the purposes of these laws to award damages for the type of injury claimed." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

Fourth, the practical implications of the Ninth Circuit's rule are dramatic. "Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 775 (1984). After all,

> antitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. * * * They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings.

Town of Concord, 915 F.2d at 22.

As then-Judge Breyer explained in similar circumstances, "we ask ourselves what advice a lawyer, faced with the [Ninth Circuit's] rule, would have to give a client considering procompetitive [bidding] in a concentrated industry." *Barry Wright*, 724 F.2d at 235. And the answer to that question is that no lawyer can give confident advice on what a jury will think is an "unnecessary" purchase or an "unfair" price. Indeed, *amici* representing a broad spectrum of the economy have provided the Court with concrete examples that illustrate the ways that the ruling below "create[s] widespread uncertainty for significant portions of the American economy" and "casts a shadow over many routine, day-to-day purchasing decisions." American Meat Inst. Cert. Am. Br. 3;

see *id.* at 2-3; Campbell Cert. Am. Br. 18-20; Business Roundtable Cert. Am Br. 7.[19]

If subjected to the Ninth Circuit's rule, businesses accordingly would err on the side of less aggressive competition. The harm from this outcome would be felt not only by the buyers, who would be constrained in obtaining necessary inputs, but also by the sellers, including small businesses, that would be denied the benefit of aggressive buy-side competition for their products. The court of appeals' rule thus would "prove counter-productive, undercutting the very economic ends [it] seek[s] to serve." *Barry Wright*, 724 F.2d at 234.

This effect would occur throughout the economy: on its face, the Ninth Circuit's ruling applies to procurement decisions of every kind of business purchasing every kind of input, including produce, natural resources, livestock, sophisticated components, even skilled employees – and there are many concentrated input markets. See Noll, *supra*, at 589-90.

There is no doubt that a readily-available pool of potential plaintiffs would be willing to take advantage of the opportunity to bring suit under such a standard. Then-Judge Breyer recognized this threat with respect to predatory selling: "if private plaintiffs are allowed to attack [above-cost prices], we are unlikely to lack for plaintiffs willing to make the effort. After all, even the most competitive of price cuts

---

[19] Because the Ninth Circuit's "fairness" standard turns on the impact of the defendant's purchase price on that defendant's competitors, it seems to require a company to ascertain its competitors' cost structures – an obligation that itself gives rise to antitrust concerns about exchanges of information among competitors. *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 459 (1978) ("exchanges of price information – even when putatively for purposes of [complying with the antitrust laws] – must remain subject to close scrutiny under the Sherman Act").

may hurt rivals; indeed, such may well be its object. And those rivals, if seriously damaged, may well bring suit." *Barry Wright*, 724 F.2d at 235.

The same is true of buy-side competitors. Any competitor that is losing in the marketplace and unable to compete effectively for inputs can argue that its larger competitors have driven up input prices; without an objective standard, such a claim would go to the jury. Moreover, as we have discussed (at 24), the Ninth Circuit's approach allows a plaintiff to repackage its predatory selling claims as predatory buying claims.

Fifth, the chill of legitimate price competition resulting from the Ninth Circuit's approach will adversely affect the global competitiveness of American manufacturers.

The situation of the lumber industry is typical. Domestic processors compete with foreign producers for sales to the largest U.S. retailers. Those foreign producers typically pay substantially lower wages and may have much lower raw material costs than U.S. lumber producers. See, *e.g.*, R.E. Taylor & Associates, *Wood . . . Where Its Going . . . Where Its Coming From?*, Presentation to the NAWLA Magellan Club (Nov. 9, 2002), *available at* http://tinyurl.com/embv5 (comparing global whitewood labor and stumpage costs in 2000). American producers are able to remain competitive only by making substantial investments in technology, implementing the resulting efficiencies, and operating at peak volume.

The Ninth Circuit's holding severely handicaps that effort, raising questions about the legitimacy of efforts to guarantee the supply of raw materials; the court of appeals' decision thereby discourages capital investment and the implementation of economies of scale. In addition to inefficient domestic competitors, low-cost overseas manufacturers, which are not subject to the competitive drag of the Ninth Circuit's rule, are the principal beneficiaries of this ruling.

The paradigm visible in the lumber industry is repeated in industry after industry where American companies in the middle of the supply chain are competing with foreign entities that have significantly lower input costs. In each case, the Ninth Circuit rule would deter investments designed to produce efficiencies as well as legitimate competition for the inputs that more efficient producers need to operate at maximum efficiency.

C. Respondent Is Not Entitled To A Retrial On Its Predatory Pricing Claim And Its Remaining Claims Cannot Support The Verdict.

The jury's verdict cannot stand in light of the flawed instruction in this case. Because plaintiff did not introduce sufficient evidence to satisfy the *Brooke Group* standard, it is not entitled to a retrial on its predatory buying claim. Given the trial's focus on that claim, there is no credible argument that the jury necessarily based its verdict on plaintiff's other allegations of anticompetitive conduct. Although those remaining claims also are wholly insubstantial, the Court may wish to remand the case rather than itself determine in the first instance which of the two permissible dispositions, dismissal or retrial of these non-price claims, is appropriate.

1. The jury entered a general verdict on the monopolization and attempted monopolization counts. J.A. 967a. Plaintiff's presentation at trial, and its closing argument, focused heavily on the predatory buying instruction, urging the jury to find Weyerhaeuser liable for bidding up alder sawlog prices to harm competing sawmills.[20] In such circumstances,

---

[20] See, *e.g.*, J.A. 731a ("Let's just briefly cover some of the key evidence. * * * Weyerhaeuser was deliberately pushing up the costs, and we saw [one witness state] that, yes, we were projecting we would get log costs down in the future."); *id.* at 736a ("Rhetorical question. Does that [testimony] infer that we have given up some $40- to $60 million in the last three years? The three years is right there. That's $20 million a year over three years.").

where much of the jury's attention was focused on an invalid theory of liability, the verdict cannot stand.[21]

In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the plaintiff alleged a conspiracy in violation of Section 1, and supported that claim with several different conspiracy allegations. This Court held that certain of the defendants could not be considered independent entities for purposes of Section 1. The Court did *not* remand the case for assessment of the sufficiency of the evidence on the plaintiff's remaining conspiracy theories. Rather, the Court stated:

> Since we hold erroneous one theory of liability upon which the general verdict may have rested * * * it is unnecessary for us to explore the legality of the other theories. As was stated of a general verdict in *Maryland* v. *Baldwin*, 112 U.S. 490, 493 (1884), '[I]ts generality prevents us from perceiving upon which plea [the jurors] found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld * * * .'"

370 U.S. at 29-30.

Similarly, in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), this Court noted that "the jury's general verdict against [defendant] cannot be permitted to stand [] since it was based on instructions that erroneously permitted [antitrust] liability" to be premised on an imper-

---

[21] As the government explained (U.S. Cert. Am. Br. 17-18), respondent is wrong in asserting that the general instructions defining anticompetitive conduct somehow cured the flaw in the specific instruction governing the predatory buying claim.

missible ground; the erroneous instruction warranted at least a new trial. *Id.* at 384 (citing *Sunkist*, 370 U.S. at 29-30).[22]

These holdings are dispositive here. Because the instructions on plaintiff's primary theory of liability were defective, the jury's general verdict must be set aside.

2. Plaintiff is not entitled to retry its predatory buying claim. This Court has made clear that "[i]f the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated [standard], judgment could properly be entered * * * at once, without a new trial." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513 (1988)); cf. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 215 (1976) ("Throughout the lengthy history of this case respondents have proceeded on a theory of liability premised on negligence, specifically disclaiming that [defendant] had engaged in fraud or intentional misconduct. In these circumstances, we think it inappropriate to remand the action for further proceedings.") (footnote omitted).

Plaintiff made no attempt to satisfy the *Brooke Group* test – it did not try to prove, and could not have proven, either that the prices charged by Weyerhaeuser failed to cover its

---

[22] Cf. *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 312 (1986) ("When damages instructions are faulty and the verdict does not reveal the means by which the jury calculated damages, '[the] error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict.'") (quoting *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 n. 12 (1981)); *Greenbelt Coop. Pub'g Ass'n v. Bresler*, 398 U.S. 6, 11 (1970) ("The erroneous instructions to the jury would, therefore, alone be enough to require the reversal of the judgment before us. For when 'it is impossible to know, in view of the general verdict returned' whether the jury imposed liability on a permissible or an impermissible ground 'the judgment must be reversed and the case remanded.'") (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284 (1967)).

costs or that there was a "dangerous probability" the company could recoup its allegedly excessive payments for raw materials.

On costs, plaintiff has never even alleged Weyerhaeuser paid so much for alder sawlogs that it sold its finished lumber at a loss. In fact, it is undisputed that Weyerhaeuser's alder sawmills in the Pacific Northwest operated at a profit throughout the alleged predation period. See page 6, *supra*. Thus, Weyerhaeuser's prices were not merely above average variable cost, the usual measure in predatory pricing cases, but they were also above average total cost. That means that Weyerhaeuser's revenues were sufficient to cover not only the prices paid for logs and other variable costs, but its capital investments as well.[23]

Ross-Simmons' evidence of recoupment is insufficient as well. While Ross-Simmons introduced some general testimony that some Weyerhaeuser employees believed that Weyerhaeuser would have the ability to lower log prices if competitors left the market, it made no objective showing whatever that Weyerhaeuser would be able to recoup all of its losses incurred during the period of predation. See generally *Brooke Group*, 509 U.S. at 225 ("The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level *that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it.*") (emphasis added).

---

[23] Although there is some disagreement about the appropriate measure of costs when determining whether a predatory scheme (on either the sell or the buy side) resulted in the defendant selling its product below cost (see *United States* v. *AMR Corp.*, 335 F.3d 1109, 1118-19 (10th Cir. 2003)), Weyerhaeuser unquestionably sold its products at a profit throughout the period of the alleged predation under any standard.

The critical question is whether Weyerhaeuser would be able to drive *down* alder log prices after the predation period ended and keep prices at those low levels for a period of time sufficient to allow recoupment of all of its alleged losses. Ross-Simmons did not introduce any evidence to that effect. Indeed, the entry of new mills and expansion of existing mills *during the period of predation* provides strong evidence that if Weyerhaeuser reduced its prices for logs, thereby seeking to obtain monopsony profits, it would be met by competition from other log buyers, a decline in supply, or both:

> Particularly damaging to the predatory pricing plaintiff's case is entry that occurred during the predation campaign itself. These prices are alleged to be nonremunerative to the defendant and so low as to inflict serious injury on the plaintiff and perhaps others. As a general proposition, no rational firm would enter a market where incumbents are already losing money and where the addition of its own output will lower prices even further. Presumptively, therefore, entry during the alleged predation period defeats any predatory pricing claim.

III Areeda & Hovenkamp, *supra*, ¶ 729c2, at 351.[24]

The Ninth Circuit's determination that plaintiff had established a dangerous probability of *successful monopolization* does not suffice to establish a dangerous probability of *recoupment*. "[I]t is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new

---

[24] Even Ross-Simmons' former general manager acknowledged that "[e]very time you have a drop in prices, the marginal supplier says, I'm not willing to sell at that price. Availability drops off." J.A. 631a. The timber sellers' amicus brief confirms that observation. Campbell Cert. Am. Br. 12-14 & nn.4-5. This decrease in supply in response to any price decrease would thwart any attempt at recoupment.

competitors eager to share in the excess profits. The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." *Matsushita*, 475 U.S. at 589-90; see *id.* at 590 ("These observations apply even to predatory pricing by a single firm seeking monopoly power.").

The total absence of proof on the key elements of the *Brooke Group* standard precludes a retrial on the predatory buying claim.

3. Plaintiff's remaining Section 2 conduct allegations are insubstantial. For example, plaintiff introduced evidence that Weyerhaeuser entered into some exclusive contracts with alder log suppliers, but did not even attempt to demonstrate that a substantial amount of the market was foreclosed – a fatal flaw in an exclusive dealing allegation. XI Areeda & Hovenkamp, *supra*, ¶ 1821d, at 183 ("low foreclosure percentages are decisive for the defendant"). Similarly, plaintiff cited Weyerhaeuser's acquisition of several sawmills as alleged anticompetitive acts, but did not provide any basis for that assertion. Plaintiff's potpourri of other claims of anticompetitive conduct are equally devoid of merit; indeed, plaintiff itself recognized the insubstantial nature of these allegations by offering absolutely no proof of damages related to *any* claimed misconduct by Weyerhaeuser other than the asserted overpayment for logs.[25] As we have shown (at pages 44-47), the judgment may not be upheld on the basis of these non-price claims; because the general verdict may not stand, the only permissible options are to dismiss or to retry

---

[25] See J.A. 298a-302a, 320a-326a, 457a-469a, 476a; see also Pet. App. 26a; *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 572-73 (1990) ("a plaintiff may not recover damages merely by showing a violation of the Act; rather, the plaintiff must also 'make some showing of actual injury attributable to something the antitrust laws were designed to prevent'") (citations omitted).

these claims. Although we believe it is apparent that plaintiff should not prevail on the non-price claims, the Court may wish to remand the case rather than itself address in the first instance whether dismissal rather than retrial of these claims is appropriate.

CONCLUSION

The judgment of the court of appeals should be reversed; if the case is remanded, it should be with directions that any further proceedings be limited to respondent's non-predatory pricing claims.

Respectfully submitted.

STEPHEN V. BOMSE
M. LAURENCE POPOFSKY
Heller Ehrman LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

KEVIN J. ARQUIT
JOSEPH F. TRINGALI
Simpson Thacher
& Bartlett LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
NICKOLAI G. LEVIN
Mayer, Brown, Rowe
& Maw LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

KENNETH F. KHOURY
GUY C. STEPHENSON
Weyerhaeuser Company
33663 Weyerhaeuser Way S.
Federal Way, WA 98003
(253) 924-2345

AUGUST 2006